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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 ROBERT J KING,

11 Plaintiff,

12 v.

13 CLALLAM BAY CORRECTIONS
14 CENTER et al.

15 Defendants.

CASE NO. C11-5269-RBL-JRC

REPORT AND
RECOMMENDATION TO DISMISS
THE ACTION WITH PREJUDICE

NOTED FOR: November 18, 2011

16 This 42 U.S.C. §1983 civil rights matter has been referred to the undersigned
17 Magistrate Judge pursuant to 28 U.S.C. §§ 636 (b)(1)(A) and (B) and Local
18 Magistrate Judge Rules MJR 1, MJR 3, and MJR 4. The Court recommends that
19 defendants' motion for summary judgment be granted and that this action be
20 dismissed with prejudice.
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22 Plaintiff brings this action regarding medical treatment he received for
23 appendicitis. This action was removed from state court prior to service on all
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1 defendants. The Court entered an order granting plaintiff leave to proceed in forma
2 pauperis and directing him to file a filled-out service form so that the court could
3 serve the one remaining unserved defendant -- Mr. Miller (ECF No. 18). In that
4 order the Court specifically warned plaintiff that "Failure to provide these
5 documents will result in a Report and Recommendation to dismiss Mr. Miller for
6 failure to comply with a court order and failure to prosecute an action." Plaintiff has
7 not complied with the Court's order.

9 Further, the remaining defendants have moved for summary judgment (ECF
10 No. 19). Defendant Miller has joined in that motion (ECF No. 21). Plaintiff has
11 not responded.

12 Since defendant Miller has appeared and joined in the motion for summary
13 judgment, service is no longer an issue. The Court has considered the file and
14 recommends that the motion for summary judgment be GRANTED.

16 FACTS

17 The following facts are taken from defendants' motion for summary
18 judgment and are not contested (ECF No. 19). Plaintiff suffers from many chronic
19 medical problems of longstanding duration including hepatitis C, diabetes mellitus,
20 hypertension, foot pain related to diabetes, glaucoma, chronic skin rashes, arthritis,
21 and gastro esophageal reflux disease (GERD) causing chronic gastritis. Plaintiff
22 may also have lung cancer. Plaintiff takes approximately 12 medications to treat
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1 these conditions, including metformin, which is used to treat diabetes. A side effect
2 of metfirmin is gastritis.

3 On March 25, 2008, plaintiff was seen on an emergency basis for abdominal
4 pain. He had no fever and while there was tenderness to light touch, there was no
5 “rebound tenderness.” Which is defined as “pain upon *removal* of pressure rather
6 than *application* of pressure to the abdomen.” [http://en.wikipedia.org/wiki/Rebound](http://en.wikipedia.org/wiki/Rebound_tenderness)
7 *tenderness*. Defendants contend that rebound tenderness is a necessary finding for
8 appendicitis (ECF No 19, page 3). PA Miller determined several possible diagnosis
9 including gastritis, possible kidney problems and possible urological problems. PA
10 Miller ordered tests and discontinued metformin because it is known to cause
11 gastritis as a side effect.
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13 Medical staff again treated plaintiff two days later. This time he had acute
14 tenderness to the abdominal area. Medical staff referred him to an outside hospital
15 for a CT scan, which revealed appendicitis. Plaintiff underwent emergency surgery
16 and, contrary to plaintiff’s claims in the complaint, the appendix had not ruptured.
17 Plaintiff had a normal recovery, but because of fluid that leaked from the appendix,
18 he was on antibiotics for a number of days. Plaintiff has made a full recovery from
19 removal of his appendix and he continues medical treatment for other chronic
20 conditions.
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STANDARD OF REVIEW

In federal court, summary judgment is required under Fed. R. Civ. P. 56(c) if the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact. Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir.1997). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). That burden may be met by “‘showing’-- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case.” Id. at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify facts that show a genuine issue for trial. Id. at 323-24; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

DISCUSSION

Defendants have provided the sworn affidavits of medical personnel and medical records that demonstrate plaintiff has received adequate medical care and that even if the diagnosis of gastritis on March 25, 2008, was erroneous, plaintiff fails to show any injury. His appendicitis was diagnosed March 27, 2008, and there was no delay in surgery once the diagnosis was made. Plaintiff has failed to contradict any of the facts set forth by defendants.

1 The Eighth Amendment prohibits deliberate indifference to a person's
2 serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 106 (1976); Jones v.
3 Johnson, 791 F.2d 769, 771 (9th Cir. 1986). The indifference to medical needs
4 must be substantial; a constitutional violation is not established by negligence or
5 "an inadvertent failure to provide adequate medical care." Estelle, 429 U.S. at 105-
6 06; Anthony v. Dowdle, 853 F.2d 741, 743 (9th Cir. 1988).

8 To establish deliberate indifference, a prisoner must show that a defendant
9 purposefully ignored or failed to respond to the prisoner's pain or possible medical
10 need. McGuckin, 974 F.2d at 1060; Estelle, 429 U.S. at 104. A determination of
11 deliberate indifference involves an examination of two elements: (1) the
12 seriousness of the prisoner's medical need; and (2) the nature of the defendant's
13 response to that need. McGuckin, 974 F.2d at 1059. A serious medical need exists
14 if the failure to treat a prisoner's condition could result in further significant injury
15 or the unnecessary and wanton infliction of pain. Id.

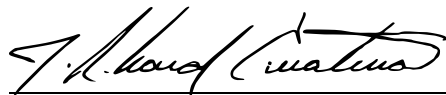
17 In order to establish deliberate indifference there must first be a purposeful
18 act or failure to act on the part of the defendant. Id. at 1060. Further, a prisoner
19 can make no claim for deliberate medical indifference unless the denial was
20 harmful. McGuckin, 974 F.2d at 1060; Shapely v. Nevada Bd. of State Prison
21 Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985).

1 Plaintiff fails to show that defendants were either negligent or deliberately
2 indifferent. He did not present with the symptoms for a diagnosis of appendicitis
3 on March 25, 2008. Two days later, when his pain became acute he was
4 reexamined and treated promptly. Defendants are entitled to summary judgment in
5 this case.
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7 With these undisputed facts, defendants have shown that there is an absence
8 of evidence to prove plaintiff's case. Therefore, this Court recommends that the
9 case be dismissed with prejudice.

10 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall
11 have fourteen (14) days from service of this Report to file written objections. See
12 also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those
13 objections for purposes of de novo review by the district judge. See 28 U.S.C. §
14 636(b)(1)(C). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the
15 clerk is directed to set the matter for consideration on November 18, 2011, as noted
16 in the caption.
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18 Dated this 26th day of October, 2011.
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21 J. Richard Creatura
22 United States Magistrate Judge
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